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IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER AND JOHN M. PERZEL, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Whether the District Court erred in effectively concluding that voters affiliated with a major political party may never state a claim of unconstitutional partisan gerrymandering, thereby nullifying this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986).

2. Whether a State presumptively violates the Equal Protection Clause when it subordinates all traditional, neutral districting principles to the overarching goal of drawing a congressional redistricting map that achieves maximum partisan advantage for members of one political party.

3. Whether a State exceeds its delegated power under Article I of the Constitution when it draws congressional-district boundaries to ensure that candidates from one political party will consistently capture a supermajority of the State's congressional seats even if those candidates win less than half the popular vote statewide.

PARTIES TO THE PROCEEDING

Appellants are Richard Vieth, Norma Jean Vieth, and Susan Furey. Appellees are Robert C. Jubelirer, President Pro Tempore of the Pennsylvania Senate; John M. Perzel, Speaker of the Pennsylvania House of Representatives; Edward G. Rendell, Governor of Pennsylvania; Catherine Baker Knoll, Lieutenant Governor of Pennsylvania; Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania; and Monna J. Accurti, Commissioner of the Bureau of Commissions, Elections and Legislation of the Pennsylvania Department of State.

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Anne Arundel County Republican Central Committee v. State Administration Board of Election Laws, 781 F. Supp. 394 (D. Md. 1991), *summarily aff'd*, 504 U.S. 938 (1992) 29

Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988), *summarily aff'd*, 488 U.S. 1024 (1989) 3, 15

Badham v. Eu, No. C-83-1126 RHS (N.D. Cal. Oct. 11, 1988) (three-judge court) (Schnacke, J., dissenting), *available at* Petition for Rehearing 1a, *Badham v. Eu*, 488 U.S. 1024 (1989) 12

Baker v. Carr, 369 U.S. 186 (1962) 21, 30

Bush v. Vera, 517 U.S. 952 (1996) 7, 24, 31, 33

Colegrove v. Green, 328 U.S. 549 (1946) 29

Cook v. Gralike, 531 U.S. 510 (2001) 27, 28, 29

Davis v. Bandemer, 478 U.S. 109 (1986) ..... *passim*

Easley v. Cromartie, 532 U.S. 234 (2001) 11, 32, 33, 39

Elrod v. Burns, 427 U.S. 347 (1976) 23

Gaffney v. Cummings, 412 U.S. 735 (1973) 25, 32

Georgia v. Ashcroft, 123 S. Ct. 2498 (2003) 39

Grutter v. Bollinger, 123 S. Ct. 2325 (2003) 33

Hunter v. Erickson, 393 U.S. 385 (1969) 24

Johnson v. De Grandy, 512 U.S. 997 (1994) 37, 40

Karcher v. Daggett, 462 U.S. 725 (1983) 16, 22, 28

Kirkpatrick v. Preisler, 394 U.S. 542 (1969) 22

Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964).....35

Martinez v. Bush, 234 F. Supp. 2d 1275 (S.D. Fla. 2002).....8, 12

Miller v. Johnson, 515 U.S. 900 (1995).....19, 31, 32, 33

Police Department v. Mosley, 408 U.S. 92 (1972).....23

Reynolds v. Sims, 377 U.S. 533 (1964).....21, 22, 30

Romer v. Evans, 517 U.S. 620 (1996).....24

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995).....23

Shaw v. Reno, 509 U.S. 630 (1993).....19, 30, 33

Smiley v. Holm, 285 U.S. 355 (1932).....27

Terrazas v. Slagle, 821 F. Supp. 1162 (W.D. Tex. 1993).....4

Thornburg v. Gingles, 478 U.S. 30 (1986).....7, 37, 40

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).....19, 26, 27, 28, 29

Wesberry v. Sanders, 376 U.S. 1 (1964).....25, 26

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).....23

Whitcomb v. Chavis, 403 U.S. 124 (1971).....30

STATUTES

2 U.S.C. § 2c.....34

42 U.S.C. § 1973.....36

28 C.F.R. § 51.59(c).....37

28 C.F.R. § 51.59(d).....37

U.S. Const. art. I, § 2, cl. 1.....*passim*

U.S. Const. art. I, § 3, cl. 1.....26

U.S. Const. art. I, § 4, cl. 1.....*passim*

U.S. Const. amend. XIV.....*passim*

LEGISLATIVE MATERIAL

Pa. House Journal (Jan. 3, 2002).....17

Pa. House Journal (Apr. 17, 2002).....17

MISCELLANEOUS

Alan I. Abramowitz & Brad Alexander, *A Permanent Republican Majority? The 2002 Midterm Election and the Future of American Politics* (Am. Pol. Sci. Ass'n 2003), *available at* http://archive.allacademic.com/ publication/docs/apsa_proceeding/2003-08-8/10/apsa_proceeding_10.pdf (visited Aug. 28, 2003).....7

Paul R. Abramson, John H. Aldrich & David W. Rohde, *Change and Continuity in the 2000 and 2002 Elections* (2003).....7

John Adams, *Thoughts on Government* (1776), *in* 1 *American Political Writing During the Founding Era, 1760-1805* (Charles S. Huneman & Donald S. Lutz eds., 1983).....26

Sen. John Andrews, *Speakout*, Rocky Mt. News, June 9, 2003.....10

1 *Annals of Congress* (1789).....28

Charles Backstrom, Leonard Robins & Scott Eller, *Establishing a Statewide Electoral Effects Baseline* in *Political Gerrymandering and the Courts* 145 (Bernard Grofman ed., 1990).....38

Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 Am. J. Pol. Sci. 35 (2000).....8

Michael Barone & Richard E. Cohen, *The Almanac of American Politics 2004* (2003).....4, 5, 49

Clerk of the House of Representatives, *Statistics of the Congressional Election of November 5, 2002* (2003).....5

Richard E. Cohen, *Broken Barometer*, Nat'l J., July 12, 2003.....5, 6, 7, 9, 10

CQ's Politics in America 2004: The 108th Congress (David Hawkings & Brian Nutting eds., 2003).....4, 8, 9, 10, 13

Tim Curran & John Mercurio, *A Seat at the Table: Parties Brace for Looming Remaps*, Roll Call, Mar. 19, 1998.....42

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 2d ed. 1888).....28

The Declaration of Independence (1776).....21

Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (1968).....23, 24

Michael J. Dubin, *United States Congressional Elections, 1788-1997* (1998).....5

Editorial, *Broken Democracy*, Wash. Post, Nov. 10, 2002.....11

Editorial, *Incumbent Protection Racket*, Wall St. J., Aug. 15, 2003.....11

Thomas B. Edsall, *Democrats Hold Edge Over GOP in Redistricting; Gains Still Possible for Republicans*, Wash. Post, Dec. 14, 2001.....42

John Hart Ely, *Gerrymanders: The Good, The Bad, and The Ugly*, 50 Stan. L. Rev. 607 (1998).....11

David J. Garrow, *Ruining the House*, N.Y. Times, Nov. 13, 2002.....11

Judith Graham, *Redistricting Draws Partisan Blood in Colorado*, Chi. Trib., May 27, 2003.....10

Bernard Grofman & Howard Scarrow, *The Riddle of Apportionment: Equality of What?*, 70 Nat'l Civic Rev. 242 (1981).....35

Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77 (1985).....32

Lisa Handley, *A Guide to 2000 Redistricting Tools and Technology*, in *The Real Y2K Problem* (Nathaniel Persily ed., 2000).....8

Steven Hill, *Fixing Elections* (2002).....9

How to Rig an Election, The Economist, Apr. 27, 2002.....11

Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2002).....11

Samuel Issacharoff & Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998).....11

Gary C. Jacobson, *The Politics of Congressional Elections* (5th ed. 2001).....40

Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 Pol. Sci. Q. 5 (2001).....8

Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 Pol. Sci. Q. 1 (2003).....5, 7, 8

Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism,* 71 Tex. L. Rev. 1705 (1993) 11

Arend Lijphart, *Comparative Perspectives on Fair Representation*, in *Representation and Redistricting Issues* (Bernard Grofman, Arend Lijphart, Robert B. McKay & Howard A. Scarrow eds., 1982) 35

Nick Madigan, *On the Lam, Texas Democrats Rough It*, N.Y. Times, Aug. 1, 2003 10

Kenneth C. Martis, *The Historical Atlas of United States Congressional Districts, 1789-1983* (1982) 34

Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103 (2000) 12, 36

Stephen K. Medvic & Matthew M. Schousen, *The 2002 Pennsylvania Seventeenth Congressional District Race*, in *The Last Hurrah?* 291 (David B. Magleby & J. Quin Monson eds., 2003) 48, 49

Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland,* 54 Md. L. Rev. 242 (1995) 11, 12

Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, *Vital Statistics in Congress, 2001-2002* (2002) 4, 5

Keith T. Poole, *108th House Rank Ordering, available at* http://voteview.uh.edu/hou108.htm (visited Aug. 28, 2003) 9

Richard A. Posner, *Law, Pragmatism, and Democracy* (2003) 11, 25

Chuck Raasch, *Competition Exists in House Races May Be Thing of the Past*, Gannett News Serv., Nov. 29, 2002 5

1 *The Records of the Federal Convention of 1787* (Max Farrand ed., rev. ed. 1966) 26, 27

T R. Reid, *GOP Redistricting: New Boundaries of Politics*, Wash. Post, July 2, 2003 10

Dan Rostenkowski, *Take Politics Out of Redistricting*, Chi. Sun-Times, Nov. 10, 2002 11

2 Joseph Story, *Commentaries on the Constitution of the United States* § 574 (1833) 26

John Wildermuth, *Lawmakers Use Creative License in Redistricting*, S.F. Chron., Sept. 2, 2001 5

George F. Will, *Careless People In Power*, Wash. Post, Aug. 3, 2003 ..... 10, 11

OPINIONS BELOW

The District Court's opinion and order are reported at 241 F. Supp. 2d 478 and reprinted at pages 1a to 12a of the Appendix to the Jurisdictional Statement ("J.S. App."). An earlier opinion addressing standards for partisan gerrymandering in more detail is reported at 188 F. Supp. 2d 532 and reprinted at J.S. App. 13a-45a.

JURISDICTION

The three-judge District Court's final opinion and order dismissing Appellants' claims for injunctive relief from an alleged partisan gerrymander were entered on January 24, 2003. Pursuant to 28 U.S.C. § 2101(b), the notice of appeal was timely filed on February 24, 2003. J.S. App. 126a-127a. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 2 of Article I of the Constitution provides in part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."

The Elections Clause of Article I, Section 4 of the Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

STATEMENT

Following the 2000 census, Pennsylvania lost two congressional seats to reapportionment, and its General Assembly had to enact a new districting plan. The goal of

that plan – frankly admitted by Pennsylvania legislative leaders and the national Republican officeholders who had significant input into the process – was to maximize the number of Republicans elected to Congress throughout the decade, while eliminating as many Democratic incumbents as possible. To that end, the General Assembly sacrificed every redistricting principle traditionally applied in Pennsylvania, slicing through municipalities, counties, and communities and creating bizarrely shaped districts that are commonly referred to by their resemblance to animals (the "supine seahorse," the "upside-down Chinese dragon," etc.). *See, e.g.*, J.S. App. 164a-166a (color maps). The new districting scheme also guaranteed that several Democratic incumbents would lose by "pairing" them in the same districts; by contrast, the scheme provided safe seats for each Republican incumbent and created two open seats custom designed to send particular Republican state senators to Washington. The result was as intended: Republicans won 12 of Pennsylvania's 19 new congressional seats and are now effectively guaranteed a supermajority of seats for the next decade, even if their congressional candidates attract fewer votes statewide than do their Democratic opponents.

What happened in Pennsylvania in 2002, unfortunately, is not an isolated event. Gerrymandering has become an increasingly serious problem nationwide as computer technology has advanced and politicians have grown confident that this Court's ruling in *Davis v. Bandemer*, 478 U.S. 109 (1986), creates no enforceable limits on partisanship in redistricting. At the same time, most congressional districts have become so uncompetitive that electoral outcomes are preordained, even in States with districting plans heavily biased to favor one party. Indeed, in the last election, fewer than one percent of all congressional incumbents lost to challengers.

As we show, there are compelling reasons why this Court should enunciate a workable standard that puts a stop to these severe distortions of the democratic process. To be sure, it would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines. But when gerrymandering reaches the point where one political party guarantees itself a solid majority of seats, even if it wins only a minority of the votes, the Constitution must provide a remedy.

1. The Current State of Congressional Redistricting: Noncompetitiveness Nationally, Combined with Severe Partisan Bias in Some States.

In *Bandemer*, this Court held that the Equal Protection Clause prohibits severe partisan gerrymanders that consign "majorities . . . to minority status." 478 U.S. at 126 n.9. The plurality opinion announced that a plaintiff raising a partisan-gerrymandering claim must show that "the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively," and that this showing can be "supported by evidence of continued frustration of the will of a majority of the voters." *Id.* at 133; *see also id.* at 135.

Bandemer's teaching – that the Constitution prohibits redistricting that consistently thwarts majority will – has been lost, however, in subsequent lower-court decisions. Not one congressional or state-legislative districting plan has been struck down as a partisan gerrymander. The courts have nullified *Bandemer* by requiring plaintiffs to show that they will be completely "shut out" of the State's political processes. *See, e.g.*, J.S. App. 39a; *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (three-judge court) (upholding California's infamous "Phil Burton gerrymander"), *summarily aff'd*, 488 U.S. 1024 (1989). One court went so far as to require plaintiffs to show that a particular redistricting plan turns them into "political

pariahs" unable to win statewide office. *Terrazas v. Slagle*, 821 F. Supp. 1162, 1173 (W.D. Tex. 1993) (three-judge court) (per curiam). Today, despite *Bandemer*, lower courts interpret the Constitution to place no meaningful check on partisan gerrymandering.

Redistricters have taken full advantage of this legal vacuum. The congressional redistricting plans enacted in the wake of the 2000 federal decennial census were historic for two reasons. First, they created remarkably few competitive districts nationwide. Second, in a handful of States, including Pennsylvania, severe gerrymanders dramatically tilted the playing field to favor one political party. These two features interact to frustrate majority rule: The partisan bias makes the House unrepresentative of the people, and the scarcity of competitive seats drains any potential for fixing that imbalance through the normal electoral process.

Noncompetitive Districts. Competitiveness reached historic lows in the 2002 congressional elections. Ordinarily, in the first election following reapportionment and redistricting, competitiveness increases and incumbents are weakened: On average, in the three prior post-reapportionment elections (1972, 1982, and 1992), more incumbents retired from the House than in other election years, more were defeated, and fewer won landslide reelections.[1]

That pattern did not hold in 2002.[2] In most States, the new redistricting plans bolstered the most vulnerable

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[1] *See* Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, *Vital Statistics in Congress, 2001-2002*, at 69, 75 (2002) [hereinafter "*Vital Statistics*"].

[2] Except where otherwise noted, all recent election returns cited in this brief come from *CQ's Politics in America 2004: The 108th Congress* (David Hawkings & Brian Nutting eds., 2003) [hereinafter "*Politics in America*"]; Michael Barone & Richard E. Cohen, *The Almanac of* *continued*

incumbents (and suppressed competition) by adding "friendly" precincts to their districts and removing "unfriendly" ones.[3] In the 2002 general elections, only four challengers ousted incumbents – a record low not only for a redistricting year, but for any election year.[4] In California, none of the 50 general-election congressional challengers garnered even 40% of the total vote. As one observer put it bluntly: "'This new plan basically does away with the need for elections.'"[5] On average across the Nation, the 435 victorious candidates won a higher percentage of the major-party vote than in any House election in more than half a century.[6] Indeed, in 80 of the 435 districts, one of the two major parties did not even field a candidate.[7]

American Politics 2004 (2003) [hereinafter "*Almanac*"]; or Clerk of the House of Representatives, *Statistics of the Congressional Election of November 5, 2002* (2003).

[3] *See* Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 Pol. Sci. Q. 1, 10 (2003).

[4] *See Vital Statistics*, *supra* note 1, at 69; Michael J. Dubin, *United States Congressional Elections, 1788-1997*, at xx-xxi (1998).

[5] John Wildermuth, *Lawmakers Use Creative License in Redistricting*, S.F. Chron., Sept. 2, 2001, at A6 (quoting California redistricting consultant Tony Quinn).

[6] *See* Chuck Raasch, *Competition in House Races May Be Thing of the Past*, Gannett News Serv., Nov. 29, 2002 (citing political scientist Gary Jacobson); *see also* Richard E. Cohen, *Broken Barometer*, Nat'l J., July 12, 2003, at 2240, 2241 (noting that 34% of House members in 1992, but only 17% in 2002, won reelection with less than 60% of the vote). "Major-party votes" are those cast for Democratic or Republican candidates and thus exclude the relatively few votes cast for independent or third-party House candidates.

[7] The lack of competitiveness in general elections has not been offset by heightened competition in party primaries. Only four percent of current Representatives won their initial election by defeating an incumbent in a primary. *See Vital Statistics*, *supra* note 1, at 77.

This lack of competition was peculiar to U.S. House elections, where redistricting has an impact: On the same day when barely one out of twelve House elections were decided by ten percentage points or less, roughly half of all gubernatorial and U.S. Senate elections were that close. As one commentator summarized it, "most of the once-responsive House is now locked in cement."[8]

Severe Partisan Bias in Some States. While historic levels of uncompetitiveness infected congressional districting in most States in 2002, severe partisan bias was confined to a handful of States. In States with divided governments, partisan gerrymandering rarely occurs. But where one political party has unilateral control over the legislature and the governorship at the critical moment when the census data come out, extreme partisan gerrymandering becomes possible and, in the current environment, increasingly likely – even in "swing" States where the electorate is divided roughly evenly between Democrats and Republicans.

For example, this decade, at least in four States – Florida, Pennsylvania, Ohio, and Michigan – Republican leaders sought to maximize the number of Republican seats. These are considered "50-50 States," as evidenced by the results in recent statewide elections where redistricting played no role.[9] Nonetheless, after redistricting, Republicans now hold 51 of the States' 77 House seats – a nearly two-to-one advantage.

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[8] Cohen, *supra* note 6, at 2246.

[9] In these four States, Vice President Gore won 50.7% of the major-party vote in the 2000 presidential contest (as compared with 50.1% in the other 46 States), and Democrats now hold four of the eight U.S. Senate seats and two of the four governorships.

This imbalance results not from effective campaigning, appealing candidates, or a significant shift in voter sentiment, but rather from the three classic techniques of partisan gerrymandering: packing, cracking, and pairing.[10] "Packing" and "cracking" are precisely the same concepts found in Voting Rights Act cases: Whenever an identifiable group is unevenly distributed across a State, its voting strength can be diluted either by over-concentrating, or "packing," its members into the fewest possible districts and thus effectively wasting votes that might have had a meaningful impact in neighboring districts, or by fragmenting, or "cracking," concentrations of the group's members and dispersing them into districts where they will constitute ineffective minorities of the electorate. *See Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

The third gerrymandering technique is to "pair" two incumbents from the same political party into a single district, which typically forces one of them to retire or lose a bloody primary fight. *See Bush v. Vera*, 517 U.S. 952, 964 (1996) (O'Connor, J., principal opinion) (holding that protecting the seniority of congressional incumbents by avoiding needless pairing is a legitimate state goal) (citing cases). Some pairings were inevitable in Pennsylvania, Ohio, and Michigan, which all lost seats due to reapportionment. But in those three States, the burden fell almost entirely on one party: 15 of the 27 Democratic incumbents, but only 1 of the 29 Republican incumbents,

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[10] *See* Paul R. Abramson, John H. Aldrich & David W. Rohde, *Change and Continuity in the 2000 and 2002 Elections* 262 (2003); Alan I. Abramowitz & Brad Alexander, *A Permanent Republican Majority? The 2002 Midterm Election and the Future of American Politics* 11-12 (Am. Pol. Sci. Ass'n 2003), *available at* http://archive.allacademic.com/publication/docs/apsa_proceeding/2003-08-8/10/apsa_proceeding_10.pdf (visited Aug. 28, 2003); Cohen, *supra* note 6, at 2242, 2244; Jacobson, *supra* note 3, at 1, 9, 19.

were effectively paired. Similarly, in Georgia, where Democrats controlled the process, four Republican incumbents were paired into two districts, even though the State was *gaining* seats and thus no pairings were necessary.

In recent years, redistricters have succeeded in refining these techniques, for three reasons. *First*, advances in computer technology and political databases now enable partisan cartographers to pack more of the rival party's voters into fewer districts. Redistricting software allows mapmakers to craft literally hundreds of different maps, block by block, in a matter of hours. And the computerized integration of election results and voter-registration lists with household-level data gleaned from years of campaign phone banks and door-to-door canvassing provides redistricters with a tool of unprecedented precision.[11]

Second, because fewer voters are "splitting their tickets," partisan voting patterns, especially in federal elections, have become much more consistent from office to office (*i.e.*, from President to U.S. Senator to U.S. Representative) and from election to election.[12] That enables political mapmakers today to gerrymander with greater confidence and efficiency.

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[11] *See, e.g., Martinez v. Bush*, 234 F. Supp. 2d 1275, 1351-52 (S.D. Fla. 2002) (three-judge court) (Hinkle, J., concurring). *See generally* Lisa Handley, *A Guide to 2000 Redistricting Tools and Technology*, in *The Real Y2K Problem* 27, 28-42 (Nathaniel Persily ed., 2000).

[12] *See* Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 Am. J. Pol. Sci. 35, 42-44 (2000); Jacobson, *supra* note 3, at 1, 9; Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 Pol. Sci. Q. 5, 5-13 (2001); *see also Politics in America, supra* note 2, at xxiii (noting that ticket-splitting in 2002 reached its lowest level since at least 1952).

Third, with the partisan divide in the Nation being razor thin, the political incentives to gerrymander have reached new heights. Nowadays, every last seat counts.[13]

As a result, partisan gerrymandering is not only easier, but more widespread and effective than ever before. As one leading reference book put it, the most recent redistricting will produce a "decade-long partisan lock on most House districts."[14] In Florida, Pennsylvania, Ohio, and Michigan, Republican gerrymanderers in 2001 and 2002 drew districts that spread their own party's voters efficiently, but not so thinly as to significantly threaten Republican incumbents. As a result, each of the Republican incumbents in those States (with one exception) won comfortably, by at least 14 percentage points.

Gerrymandering is also transforming the institution of Congress. With little reason to fear being disciplined by the voters, Representatives increasingly cater to their donors and party insiders, rather than to the political center where most Americans reside.[15] According to political scientists' most sophisticated measure of congressional ideology, the two House caucuses are now perfectly separated in their liberal-conservative ordering, with the most conservative Democrat being to the "left" of the most liberal Republican.[16] In the House, much more than in the Senate, bipartisan compromise around moderate policies takes a backseat to party loyalty, resulting in historic levels of polarization. And

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[13] Former House Speaker Gingrich put it succinctly: "'Redistricting is everything.'" Steven Hill, *Fixing Elections* 318 (2002).

[14] *Politics in America, supra* note 2, at xxv.

[15] *See* Cohen, *supra* note 6, at 2246.

[16] *See* Keith T. Poole, *108th House Rank Ordering, available at* http://voteview.uh.edu/hou108.htm (visited Aug. 28, 2003).

further polarization only fuels the bitterness that promotes more gerrymandering.[17]

That is evident in 2003 in Colorado and Texas, where legislatures that have recently come under one party's unified control have taken the unusual step of trying to redraw congressional districts that courts put in place just two years earlier. The unorthodox procedures used to ram these "re-redistricting" bills through legislative chambers has left state legislatures ever more polarized: Democrats walked out of the Colorado Senate en masse[18] and left Texas altogether to deny the Republicans a quorum.[19] Not surprisingly, in States where Republicans are out of power, Democrats are now threatening to reciprocate.[20] These mid-decade redistrictings will further dampen competition; if legislatures are allowed to fine-tune their gerrymanders every two years with data from the latest elections, the risk of partisan entrenchment will escalate dramatically.

The partisan-gerrymandering wars have spilled out of the legislatures and into the courtrooms. But with no

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[17] *See Politics in America, supra* note 2, at xxiii (describing redistricting's contribution to "[d]eepening partisanship in the House"); *id.* at xxv (quantifying the sharp rise in party-line floor voting in the post-redistricting House); Cohen, *supra* note 6, at 2246.

[18] *See* T.R. Reid, *GOP Redistricting: New Boundaries of Politics*, Wash. Post, July 2, 2003, at A4. Colorado's Senate President frankly admitted that "[n]onpartisanship [was] not an option" and explained that "'[w]e didn't have to play nicey-nicey.'" Sen. John Andrews, *Speakout*, Rocky Mt. News, June 9, 2003; Judith Graham, *Redistricting Draws Partisan Blood in Colorado*, Chi. Trib., May 27, 2003, at 11 (quoting Sen. Andrews).

[19] *See* Nick Madigan, *On the Lam, Texas Democrats Rough It*, N.Y. Times, Aug. 1, 2003, at A11.

[20] *See* George F. Will, *Careless People In Power*, Wash. Post, Aug. 3, 2003, at B7.

prospect of prevailing on a forthright claim of partisan gerrymandering under the lower courts' interpretation of *Bandemer*, aggrieved partisans instead often allege racial gerrymandering or minority vote dilution in violation of the Voting Rights Act. *See, e.g., Easley v. Cromartie*, 532 U.S. 234 (2001). The incentive to couch partisan disputes in racial terms bleeds back into the legislative process, too, as members of the "out" party – believing they can win only in court, and only on a race-based claim – may be tempted to spice the legislative record with all manner of racialized arguments, to lay the foundation for an eventual court challenge.[21]

All of this has not gone unnoticed by the press or academics.[22] Similarly, judges – from Richard A. Posner to Paul V. Niemeyer to Adalberto Jordan – have concurred in the view that reform is needed, but have felt hamstrung by the post-*Bandemer* caselaw that prevents plaintiffs from prevailing on partisan-gerrymandering claims.[23]

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[21] *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 640 (2002); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705, 1733-35 (1993).

[22] *See, e.g.*, Editorial, *Broken Democracy*, Wash. Post, Nov. 10, 2002, at B6; Editorial, *Incumbent Protection Racket*, Wall St. J., Aug. 15, 2003, at A8; *How to Rig an Election*, The Economist, Apr. 27, 2002, at 29-30; Will, *supra* note 20, at B7; David J. Garrow, *Ruining the House*, N.Y. Times, Nov. 13, 2002, at 29; Dan Rostenkowski, *Take Politics Out of Redistricting*, Chi. Sun-Times, Nov. 10, 2002, at 33; *see also* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L Rev. 643, 704-09 (1998); John Hart Ely, *Gerrymanders: The Good, The Bad, and The Ugly*, 50 Stan. L. Rev. 607, 621 (1998).

[23] *See, e.g.*, Richard A. Posner, *Law, Pragmatism, and Democracy* 242-45 (2003); Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland*, 54 Md. L.

continued

2. Facts and Proceedings Below

Enactment of "Act 1." The Pennsylvania congressional redistricting plan enacted in January 2002 – known as "Act 1" – epitomized the problems just described. As of 2001, Pennsylvania had 11 Republican and 10 Democratic Representatives, but the Republican-controlled General Assembly passed a map that configured the 19 new districts to hand the Republicans at least a 12-to-7 and possibly a 14-to-5 advantage, even if, as often occurs in Pennsylvania, Democratic candidates receive more total votes statewide than do Republican candidates. J.S. App. 132a-133a, 137a-142a. The new Pennsylvania plan was designed, at the urging of national party leaders, to offset expected losses in Georgia, where Democrats had unilateral control of the congressional redistricting process and had already targeted several Republican Representatives for defeat. *Id.* at 133a-134a.

The Pennsylvania legislators, armed with the supercomputer facilities at Carnegie Mellon University,[24] sacrificed every traditional districting principle – slashing through municipalities and neighborhoods, splitting counties, and producing oddly misshapen districts, especially where Democratic voters are concentrated. Among the plan's peculiar features is the "Greenwood Gash," a five-and-a-

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Rev. 242, 257-60 (1995); *Martinez v. Bush*, 234 F. Supp. 2d at 1353 (Jordan, J., concurring); *Badham v. Eu*, No. C-83-1126 RHS (N.D. Cal. Oct. 11, 1988) (three-judge court) (Schnacke, J., dissenting), *available at* Petition for Rehearing 1a, *Badham v. Eu*, 488 U.S. 1024 (1989) (summarily affirming the district court's judgment, over the dissent of Rehnquist, Stevens & Kennedy, JJ.); *cf.* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103, 105-07, 114-17 (2000).

[24] *See, e.g.*, Jurisdictional Statement, *Republican Caucus of the Pa. House of Rep. v. Vieth*, No. 01-1713, at 1-2, 9-10 (U.S. filed May 21, 2002), *appeal dismissed*, 537 U.S. 801 (2002).

half-mile long isthmus, which narrows at one point to 300 yards, connecting the Republican-leaning Bucks County-based District 8 (represented by Congressman Greenwood) to a heavily Democratic pocket of voters who otherwise would have been in the heart of Montgomery County's District 13 – and thereby might have tipped District 13 decidedly into the Democratic column. J.S. App. 136a; *see id.* at 165a (color map); Joint Appendix ("JA") 132. Several miles away, District 6 starts at the Philadelphia city line, skips westward through several Montgomery County suburbs, turns back to the east through Chester County (almost completely encircling a sizable chunk of District 7), and then juts north into the farm country of Berks County, where it splits four townships before slithering up one side of the city of Reading, which is bisected precinct by precinct to preserve the Republican tilt of two congressional districts. J.S. App. 96a, 154a-157a; *see id.* at 165a (color map). Across the State, in southwestern Pennsylvania, the "line" separating Democratic District 12 from Republican District 18 almost defies verbal description; but the picture at page 166a of the Appendix to the Jurisdictional Statement is worth a thousand words. *See also Politics in America, supra* note 2, at 878 ("Described by an aide to Rep. Murtha as 'an upside-down Chinese dragon,' the strangely contorted 12th hopscotches in southwestern Pennsylvania across nine counties, eight of which are shared with other districts.").

The map also paired six incumbents, five of whom are Democrats. Four Democratic incumbents were paired in two districts, and a fifth Democratic incumbent was paired against a Republican incumbent in a Republican-leaning district. And the plan effectively created an additional pairing, placing the home of one Democratic incumbent barely inside the edge of a district drawn to elect a Republican state senator to Congress, while including most of the Democrat's supporters in the neighboring district, where another Democratic incumbent lived. (Predictably,

the two Democrats then squared off in the 2002 primary.) That placement typified how the map gave Democratic incumbents a far greater share of new voters unfamiliar with them, while largely protecting the core of each Republican incumbent's prior district. The plan's two new open seats were designed to generate two additional Republican incumbents who could hold those seats for a decade or more.

The State-Court Challenge to Act 1. Two Pennsylvania Democratic voters filed suit in state court, claiming that the districting plan's partisan bias violated the Pennsylvania Constitution. The Pennsylvania Supreme Court exercised original jurisdiction over the case and directed the Commonwealth Court to hold an immediate trial. J.S. App. 64a. The Commonwealth Court found that the plan would produce a 14-to-5 or 13-to-6 Republican advantage in the State's congressional delegation, even if Republican candidates received less than half the votes cast. *Id.* at 94a. It also detailed the disparate effects of incumbent pairings as well as the ways in which its drafters ignored such traditional districting criteria as compactness and respect for communities of interest and municipal boundaries where necessary to achieve their partisan goals. *Id.* at 94a-97a.

Ultimately, however, the Pennsylvania Supreme Court rejected the plaintiffs' state-law claims. Purportedly basing its analysis of state law on the plurality opinion in *Davis v. Bandemer*, 478 U.S. at 127-39, the state court held that plaintiffs' claims were deficient because they had not shown that Democrats would be "shut out of the political process." J.S. App. 77a; *see id.* at 74a-77a. In dissent, Chief Justice Zappala commented: "If the record of this case does not establish unconstitutional political gerrymandering, *no such claim exists*. This Court should not then waste its valuable judicial resources entertaining illusory claims that, in reality, can never be established." *Id.* at 125a (emphasis added).

The Federal-Court Challenge to Act 1. Appellants (a different set of Pennsylvania Democratic voters) sued in the Federal District Court, claiming that Act 1 deviated without justification from the strict one-person, one-vote requirement based in Article I, Section 2 of the Constitution, and that Act 1 was a political gerrymander that deprived Pennsylvania's Democratic voters of the rights guaranteed to them by the Equal Protection Clause, as well as Article I, Sections 2 and 4, and the First Amendment. *Id.* at 135a, 137a-145a. Shortly after the state-court litigation concluded, the three-judge panel granted Appellees' motion to dismiss Appellants' political-gerrymandering claims. The court held that Appellants had satisfied *Bandemer*'s first element – "'intentional discrimination against an identifiable political group.'" *Id.* at 32a (quoting *Bandemer*, 478 U.S. at 127 (plurality opinion)). Specifically, the court found that Appellants' allegations that the General Assembly Republicans had "prevented all Democratic input on Act 1 in order to establish a Republican super-majority in Pennsylvania's congressional caucus" were sufficient to establish the Assembly's discriminatory intent against Pennsylvania citizens who vote for Democratic congressional candidates. *Id.* at 32a-33a.

But the District Court held that Appellants did not allege sufficient discriminatory *effects* to satisfy the second element of the *Bandemer* test. The court relied on *Badham v. Eu*, 694 F. Supp. at 670, to hold that Appellants could not establish Act 1's actual discriminatory effects because they could not allege "facts indicating that as a result of Act 1 [they] will be completely shut out of the political process." J.S. App. 33a. More specifically, the court faulted Appellants for failing to allege "that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern." *Id.* at 39a (citing *Badham*, 694 F. Supp. at 670).

Without such evidence of "impediments to . . . full participation in the 'uninhibited, robust, wide-open' public debate on which our political system relies," the District Court held that Appellants could not state an equal-protection claim, no matter how severe or long-lasting the effects of the partisan gerrymander might be. *Id.* (quoting *Badham*, 694 F. Supp. at 670 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))).

Appellants' one-person, one-vote claim was tried in March 2002. The court allowed Appellants to put into evidence much of their political-gerrymandering case, to rebut Appellees' assertion that the district lines – and the 19-person population deviation they created – were justified because they resulted from the pursuit of legitimate redistricting goals. On April 8, 2002, the District Court ruled in favor of Appellants, concluding that the population deviation was not justified by any neutral, consistently applied redistricting policy like those identified by this Court in *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983), and that Appellees' effort to explain the deviation in nonpartisan terms was a "mere pretext." J.S. App. at 53a, 57a.

In its findings, the court commented that "*Karcher*'s neutral criteria were not high on the priority list in enacting Act 1." *Id.* at 55a. The court also found that, "[t]o the extent that Act 1 retains the cores of prior districts, it does so only for districts containing Republican incumbents." *Id.* Finally, the court found that Act 1 "failed most miserably" in advancing the neutral goal of avoiding contests between incumbents: Although Pennsylvania's loss of two congressional seats required the pairing of only two sets of incumbents, Act 1 paired more than necessary, in a manner favoring Republicans in each instance. *See id.*

The Remedial Plan, "Act 34." On April 18, 2002, then-Governor Schweiker signed into law Act No. 2002-34, 25 P.S. § 3595.301 ("Act 34"), a remedial plan that the

Pennsylvania General Assembly had passed a day earlier to cure the one-person, one-vote problem.[25] The District Court then stayed its April 8 order, allowing Act 1 to be used for the 2002 elections while Appellees appealed the April 8 order invalidating Act 1. But because Act 34 expressly provided that Act 1 would be replaced by Act 34 after 2002, regardless of the outcome of the litigation, this Court dismissed those appeals as moot. 537 U.S. 801 (2002). And for the same reason, the Court dismissed Appellants' appeal from the dismissal of their partisan-gerrymandering challenges to Act 1. *Id.*

In the District Court, the parties proceeded to dispute whether Act 34, properly interpreted, actually eliminated the population deviation in Act 1 or exacerbated it – a dispute the court ultimately resolved in favor of Appellees in the same order here on appeal. J.S. App. 1a-12a. In addition, Appellants renewed their partisan-gerrymandering arguments, noting that the districts in Act 34 were, for all practical purposes, virtually identical to those in Act 1. Appellants showed that Act 34's districts mirrored those in Act 1, that each contained nearly all of the same population (an average of 99.34% retention per district), and that Act 34 actually increased the map's noncompactness and county and municipal splits. *Id.* at 148a-166a.

The District Court approved Act 34, explaining that it had cured the one-person, one-vote violation, and again

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[25] Although Act 1 and Act 34 were passed on party-line votes in the Pennsylvania Senate, their supporters managed to induce 25 House Democrats to vote for Act 34 (and 42 House Democrats to vote for Act 1). *See* JA 177 (describing the pressure brought to bear on these legislators by some of the Democratic Congressmen whose districts were preserved – and indeed packed with more Democratic voters); *see also* Pa. House Journal at 710-11 (Apr. 17, 2002); Pa. House Journal at 16 (Jan. 3, 2002).

rejected Appellants' partisan-gerrymandering claims. The court acknowledged that Act 34 is essentially the same as Act 1 (population deviations aside) and would have the same "partisan effect." *Id.* at 11a; *see id.* at 9a n.3 ("Despite an opportunity to improve upon the numerous deficiencies of Act 1, Defendants have returned to this court with essentially the same map."). It reiterated that, except for eliminating population deviations, Act 34 (like Act 1) "jettisons every other neutral non-discriminatory redistricting criteria that the Supreme Court has endorsed in the one person-one vote cases." *Id.* at 9a n.3. The court nonetheless held that Appellants' claim could not survive as a result of their failure to "'allege facts indicating that they have been shut out of the political process'" as required under the court's interpretation of *Bandemer* and *Badham*. *Id.* at 11a (quoting *id.* at 39a). This appeal followed.

SUMMARY OF ARGUMENT

1. The Court correctly recognized in *Bandemer* that partisan gerrymandering that thwarts majority rule is an affront to basic democratic values and is unconstitutional under the Equal Protection Clause. Two lines of constitutional cases support *Bandemer*. *First*, in the one-person, one-vote cases, the Court held that the basic democratic principles on which this Nation was founded do not permit legislators to draw unequally populated districts that make the votes cast by some citizens substantially more valuable than those cast by others. The gerrymandering of equally populated districts to favor one political party at the expense of another is just another way to inflict the same injury. *Second*, the Court's First Amendment jurisprudence prohibiting viewpoint-based discrimination is largely premised on the need to protect our democracy from indirect distortion through governmental intrusion into the free marketplace of ideas. The Equal Protection Clause is no less

implicated when government accomplishes a comparable distortion directly through gerrymandering.

In addition, Article I of the Constitution limits partisan gerrymandering of congressional districts. Section 2 of that Article mandates that Representatives be elected directly "by the People of the several States." Section 4 merely grants state legislatures the power to establish procedural regulations for holding those elections. Because the Framers intended the House of Representatives to be a highly responsive "mirror" of popular will, the States' constitutional role is not a "source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995). When a State sets out to draw congressional districts that have the effect of preventing one party from winning a majority of districts even if it wins a majority of votes, it usurps power that Article I, Section 2 reserves to "the People of the several States" and transgresses the limits of its authority under Article I, Section 4. Indeed, because the Framers intended the House to be the most representative and responsive body in the federal government, courts should scrutinize partisan gerrymandering in the congressional context with particular strictness – just as courts demand a much greater degree of population equality for congressional districts than for other legislative districts.

2. To demonstrate unconstitutional partisan gerrymandering, plaintiffs must make two showings. *First*, plaintiffs must show that the mapmakers acted with a predominant intent to achieve partisan advantage. That can be shown by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage. *See Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). *Second*, sufficient partisan effects are

established if (1) the plaintiffs show that the districts systematically "pack" and "crack" the rival party's voters, and (2) the court's examination of the "totality of circumstances" confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats.

3. The facts of this case, as stated in Appellants' complaint and as shown by evidence offered at the trial on the one-person, one-vote claim, illustrate how these standards can work in practice without causing undue judicial intrusion into redistricting. The Pennsylvania General Assembly "jettisoned" every neutral districting principle and used every trick in the book – including "packing," "cracking," and disparate "pairing" of incumbents – to assure that it would produce the very outcome we now see: an otherwise competitive State where one party is virtually guaranteed at least a 12-to-7 advantage in the congressional delegation, even when, as often occurs, the other party wins a majority of the votes cast statewide. Pennsylvania's 2002 congressional redistricting plan is a textbook example of an unconstitutional partisan gerrymander.

ARGUMENT

I. THE CONSTITUTION PROHIBITS STATE LEGISLATURES FROM MANIPULATING CONGRESSIONAL DISTRICT LINES TO THWART MAJORITY RULE.

A. The Equal Protection Clause Prohibits Gerrymanders that Consign Electoral Majorities to Minority Status Based on Their Political Viewpoint.

Two key strands of constitutional law combine to provide strong support for barring severe partisan gerrymandering under the Equal Protection Clause. The first

strand, on which the Court expressly relied in *Bandemer*, is the principle reflected in the one-person, one-vote line of cases – that States may not use electoral schemes that render the votes of some citizens more valuable than the votes cast by others. The second strand is the First Amendment bar to governmental viewpoint discrimination.

The primary principle on which this Nation was founded is that governments "deriv[e] their just powers from the consent of the governed." *The Declaration of Independence* para. 2 (1776). This case raises the question whether that principle can be squared with an electoral system deliberately designed to entrench legislators from the "in" party even if the majority of voters come to prefer the "out" party. This Court answered that question in *Bandemer*. In a case challenging a state-legislative plan, the Court held that political-gerrymandering claims are justiciable, relying primarily on *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). Extrapolating from "the objective of fair and adequate representation recognized in *Reynolds v. Sims*" and from "our general majoritarian ethic," the Court held that the Equal Protection Clause mandates "a level of parity between votes and representation sufficient to ensure . . . that majorities are not consigned to minority status." 478 U.S. at 126 n.9 (citing *Reynolds*, 377 U.S. at 565).

The problem since then is that lower courts have gutted *Bandemer* by requiring plaintiffs – who are typically affiliated with one of the two major political parties – to show not only that a map thwarts majority rule but also that they have been "shut out" of the State's political processes, in the sense of being prevented from organizing and campaigning. The decision below is a good example. *See* J.S. App. 11a. Such a rule effectively immunizes from scrutiny any gerrymander, no matter how extreme, unless it

is accompanied by separate and independent constitutional violations.

But a biased map designed to transform a voting minority into a legislative majority is by itself a clear violation of the principle of electoral equality recognized in the one-person, one-vote cases. As this Court explained in *Reynolds v. Sims*:

> None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.

377 U.S. at 564 n.41 (citation omitted). The *Reynolds* Court added:

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. . . . Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.

Id. at 565.

The Court initially hoped that it could check abuses of the redistricting process with the one-person, one-vote requirement alone. But the rule proved to be "perfectly compatible with 'gerrymandering' of the worst sort." *Kirkpatrick v. Preisler*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting); *see Karcher v. Daggett*, 462 U.S. at 753 (Stevens, J., concurring). *Bandemer* responded to that reality. Just as it was unconstitutional in the one-person,

one-vote context to spread a State's million rural voters among ten districts while concentrating a million urban and suburban voters into only five, it is likewise unconstitutional to give a State's million Republicans control over ten seats while leaving a million Democrats with control over five.

A second line of cases provides additional support for effective limits on partisan gerrymandering: the Court's First Amendment cases barring governmental imposition of a political orthodoxy and other forms of governmental discrimination based on viewpoint. The First Amendment's bar against viewpoint-based discrimination serves, in part, to prevent indirect distortion of democracy and majority rule. As the Court put it in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *Id.* at 641. Similarly, in the first case barring political discrimination in access to civil-service positions, *Elrod v. Burns*, 427 U.S. 347 (1976), the plurality proclaimed that "the First Amendment was intended to protect a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern." *Id.* at 372. Much the same purpose is served by the Court's many rulings barring other forms of governmental viewpoint discrimination. *See, e.g., Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 828-29 (1995); *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972).

Distorting democracy directly through partisan gerrymandering is even more destructive of our democratic system. Redistricting has a powerful "impact on effective competition in the marketplace of political ideas. For without a fair opportunity to elect representatives, freedom of political association yields no policy fruit." Robert G.

Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* 499 (1968). Those in government who are entrusted with the job of making the rules of the election game must not be allowed to transform the democratic process into its opposite.[26]

The effects of partisan gerrymandering are profoundly anti-democratic. It can replace the "consent of the governed" with a system in which legislators decide who will remain in office and whom they will represent. "'The final result seems not one in which the people select their representatives, but in which the representatives have selected the people.'" *Bush v. Vera*, 517 U.S. at 963 (O'Connor, J., principal opinion) (citation omitted). This foreordaining of election outcomes is particularly troubling when district lines effectively guarantee the controlling party a large majority of seats regardless of changes in the public's partisan leanings. While "everyone's vote still counts," that truism does little to preserve democracy when a districting scheme is carefully and purposefully arranged to minimize the political power of those holding a particular viewpoint – even where that viewpoint is or becomes the majority view.[27]

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[26] Closely analogous are this Court's decisions barring governments from erecting barriers that make it more difficult for particular groups of citizens to urge the adoption of laws protecting their interests. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."); *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (a law that "places special burdens on racial minorities within the governmental process . . . is no more permissible than denying them the vote, on an equal basis with others").

[27] In the past, partisan gerrymandering may well have been a self-limiting enterprise either because of resistance from incumbents or because an overly ambitious gerrymander could lead the controlling party to disaster. But with modern technologies and data, a carefully designed

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To be sure, partisan considerations and political viewpoint will play a part in any redistricting process run by political institutions such as state legislatures. "It would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). But while "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength," *id.* at 754, judicial interest should be at its zenith when the one political party transiently enjoying majority control harnesses the power of the State to insulate itself from democratic accountability.[28]

B. Extreme Partisan Gerrymandering of Congressional Districts Offends Article I of the Constitution.

Although the Equal Protection Clause, without more, prohibits egregious partisan gerrymandering as occurred here, the Court should also take note of the especially strict constitutional limits that Article I imposes on States when they are drawing *congressional* districts. In that context, the state legislatures exercise a federal power delegated to them by the Elections Clause of Article I, U.S. Const. art. I, § 4, cl. 1, and must do so in a manner consistent with Article I's requirement that Representatives be directly elected "by the People of the several States," *id.* § 2, cl. 1. *See generally Wesberry v. Sanders*, 376 U.S. 1, 7-18 (1964).

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map can now hand a supermajority of seats to a "minority" party while simultaneously making most or all of the districts noncompetitive.

[28] As Judge Posner recently noted, "judicial insouciance" toward partisan gerrymanders "designed to create 'safe' seats for the party that controls the legislature" has undermined "electoral competition, the lifeblood of democracy." Posner, *supra* note 23, at 244-45.

The institution that was meant by the Framers to truly represent "the People" was aptly named the House of Representatives. Under the "Great Compromise," the Senate would represent the States, while the House of Representatives would represent the People. *See id.* at 12-14. Senators would be chosen for six-year terms by the state legislatures, U.S. Const. art. I, § 3, cl. 1; Representatives would be directly elected for two-year terms "by the People of the several States," *id.* § 2, cl. 1.

As George Mason explained at the Constitutional Convention, the House of Representatives "was to be the grand depository of the democratic principle of the Govt." 1 *The Records of the Federal Convention of 1787*, at 48 (Max Farrand ed., rev. ed. 1966) [hereinafter "Farrand"]. John Adams had argued that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them." John Adams, *Thoughts on Government* (1776), in 1 *American Political Writing During the Founding Era, 1760-1805*, at 403 (Charles S. Huneman & Donald S. Lutz eds., 1983). Likewise, at the Convention, James Wilson of Pennsylvania advocated a national legislature that would be "the most exact transcript of the whole Society." 1 Farrand, *supra*, at 132. "Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people." *U.S. Term Limits*, 514 U.S. at 821; *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* § 574 (1833) ("The [people's] choice [of Representatives] is to be made immediately by them; so that the power is direct; the influence direct; and the responsibility direct.").

Consistent with their vision of the House of Representatives as accountable to the people rather than to

the States, the Framers limited the States' involvement to the power to set "[t]he Times, Places and Manner" of holding congressional elections. U.S. Const. art. I, § 4, cl. 1. The state legislatures' delegated Elections Clause authority was largely confined to procedural matters such as "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). As this Court noted in *U.S. Term Limits*, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." 514 U.S. at 833-34; *see Cook v. Gralike*, 531 U.S. 510, 523 (2001).

The carefully constructed grant of authority to state legislatures reflects the Framers' "overriding concern" regarding "the potential for States' abuse of the power." *U.S. Term Limits*, 514 U.S. at 808-09. The Framers were particularly worried that factional control of state legislatures might frustrate the will of the people in congressional elections. Discussing the Elections Clause at the Constitutional Convention, Madison noted:

> It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.

2 Farrand, *supra*, at 240-41.

Madison's fear that a state legislature might abuse its authority to override majority rule was echoed throughout the ratifying conventions. In Massachusetts, one delegate worried that state legislatures,

> when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors.

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 27 (Jonathan Elliot ed., 2d ed. 1888) [hereinafter "Elliot's Debates"] (Parsons). Another delegate noted that "a part [of Congress] should proceed directly from the people, and not from their substitutes, the legislatures; therefore the legislature ought not to control the elections," since "the [state] legislature may have a power to counteract the will of a majority of the people." 2 *id.* at 49 (Dana). In North Carolina, a delegate explained that limiting the state legislatures' authority over congressional elections would help "secure a representation from every part, and prevent any improper regulations, calculated to answer party purposes only." 1 *Annals of Congress* 797 (1789) (Ames).

To combat that danger, the Framers limited States' authority to regulate congressional elections. This Court therefore has interpreted Article I to mandate that congressional districts adhere to an equal-population standard much stricter than the one applicable to state and local legislative districts, *Karcher v. Daggett*, 462 U.S. at 732-33; to prohibit States from excluding congressional candidates through term-limit laws, *U.S. Term Limits*, 514 U.S. at 786-87; and to bar them from seeking to influence election outcomes by placing information about the candidates' issue positions on the ballot, *Gralike*, 531 U.S. at

523-26. Comparable strictness must apply to partisan gerrymandering of congressional districts, which unquestionably distorts the direct "relationship between the people of the Nation and their National Government, with which the States may not interfere." *U.S. Term Limits*, 514 U.S. at 845 (Kennedy, J., concurring).

As Judge Niemeyer has noted, "the right of the people to elect directly their Representatives to the larger House of the federal legislature means nothing if the Constitution does not forbid the states from manipulating the boundaries of congressional districts" in attempts to "dictate the outcome" of "the people's congressional elections." *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 402-03, 406 (D. Md. 1991) (three-judge court) (Niemeyer, J., dissenting), *summarily aff'd*, 504 U.S. 938 (1992). Judge Niemeyer's dissent resonates with an opinion Justice Black penned nearly half a century earlier, in *Colegrove v. Green*, 328 U.S. 549 (1946):

> [The States'] federally granted power with respect to elections of Congressmen is not to formulate policy but rather to implement the policy laid down in the Constitution, that, so far as feasible, votes be given equally effective weight. Thus, a state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of "apportionment" than under any other name. For legislation which must inevitably bring about glaringly unequal representation in the Congress in favor of special classes and groups should be invalidated, "whether accomplished ingeniously or ingenuously."

Id. at 571 (Black, J., dissenting) (citation omitted).

II. THE COURT SHOULD ENUNCIATE A CLEAR STANDARD FOR IDENTIFYING UNCONSTITUTIONAL PARTISAN GERRYMANDERS.

Although this Court recognized in *Bandemer* that a claim of partisan gerrymandering is justiciable, a majority of Justices could not reach agreement on a workable standard for differentiating between the "normal" consideration of political factors in redistricting and the excessive, and hence presumptively unconstitutional, use of party and partisan data. Appellees will attempt to insulate partisan gerrymandering from all judicial review by arguing, as they did below, that no intelligible standard can ever be applied consistently by the lower courts. This Court should reject that suggestion, just as it has done each time it has addressed other constitutional limits on redistricting – from one-person, one-vote, to racial vote dilution, to racial gerrymandering.

Each of those advances in redistricting law was met by a chorus of naysayers decrying the new standards as "unworkable." *See, e.g., Baker v. Carr*, 369 U.S. at 268 (Frankfurter, J., dissenting) (predicting that the one-person, one-vote standard would "catapult[] the lower courts" into a "mathematical quagmire"); *Reynolds v. Sims*, 377 U.S. at 621 (Harlan, J., dissenting) (delivering "the cold truth that cases of this type are not amenable to the development of judicial standards"); *Whitcomb v. Chavis*, 403 U.S. 124, 169 (1971) (separate opinion of Harlan, J.) (accusing the Court, in a minority vote-dilution case of first impression, of becoming "enmeshed in [a] haze of slogans and numerology"); *Shaw v. Reno*, 509 U.S. at 661 (White, J., dissenting) (attacking the Court's standard for "invit[ing] constant and unmanageable [judicial] intrusion").

But each generation of critics has been proved wrong. The lower courts have applied the tests set out in these cases with an admirable degree of consistency. And, perhaps more importantly, redistricters have internalized the standards and

generally steered clear of any potential liability. Today, virtually all districting plans comply with one-person, one-vote standards, minority representation has climbed to levels unimaginable a generation ago, and the crazy-quilt racial line-drawing of the early 1990s has been almost universally abandoned.[29] The Court should follow the same path in addressing the problem of partisan gerrymandering that has become so pronounced in recent days.

To limit judicial intrusion and target the truly egregious examples where gerrymandering can frustrate majority rule, the Court should adopt a standard that is clear and narrowly tailored to the problem at hand. A clear standard will insulate lower-court judges from false accusations of partiality. And a narrowly tailored standard that places a heavy burden of proof on plaintiffs will avoid "throw[ing] into doubt the vast majority of the Nation's 435 congressional districts." *Miller v. Johnson*, 515 U.S. at 928 (O'Connor, J., concurring).

The test proposed here borrows heavily from this Court's established jurisprudence on redistricting but adapts each part to the partisan-gerrymandering context. The test's "intent" element recognizes, as the Court's *Shaw* cases recognized with respect to race, that politics can be a permissible redistricting consideration but cannot override all other considerations. The test's "effects" element builds on this Court's well-established jurisprudence on vote dilution, which addresses analogous harms, but requires plaintiffs to make a stronger showing consistent with the

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[29] While some Members of the Court faulted the *Shaw* line of cases for failing to provide a clear line between the uses of race that are unconstitutional and those that are justified by the Voting Rights Act, *see, e.g., Bush v. Vera*, 517 U.S. at 1063-64 (Souter, J., dissenting), no such "Catch-22" problem could be raised here. A State cannot be held liable for *avoiding* partisan gerrymandering.

Bandemer Court's focus on partisan gerrymanders that thwart majority rule.

A. The Intent Element

Politics will always be a part of redistricting. It can be legitimate, for example, to consider political data when attempting to produce a "fair" map. *See Gaffney v. Cummings*, 412 U.S. at 751-54; *see also Easley v. Cromartie*, 532 U.S. at 257-58 (upholding a district drawn to preserve a congressional delegation with six Republicans and six Democrats). It is also asking too much to expect line-drawers *never* to consider the goal of gaining partisan advantage in particular districts. To prevent the mere consideration of politics from triggering a *Bandemer* claim, the Court should require a higher showing: that partisan advantage was the predominant motivation behind the entire statewide plan. *Cf. Miller v. Johnson*, 515 U.S. at 910-20.

A predominant intent to achieve partisan advantage can sometimes be shown directly – as in Colorado and Texas this year, when redistricters have frankly admitted that they are replacing perfectly legal maps, out of season, solely for partisan advantage. Direct evidence of excessive partisanship can be critical because, as political scientists have long recognized, some partisan gerrymanders can be highly effective without generating "ugly" maps. *See, e.g.*, Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 88, 170-71 (1985).

More often, a predominantly partisan intent will be shown through circumstantial evidence that other legitimate and neutral districting criteria were subordinated to partisan considerations. Although the list of traditional districting criteria may vary somewhat, depending on each State's constitution and customary practices, this Court has already identified five key principles: (1) contiguity; (2) compactness; (3) respect for political subdivisions such as counties and municipalities; (4) respect for communities

defined by actual shared interests; and (5) avoiding the needless pairing of two or more incumbent Representatives in a single district. *See Bush v. Vera*, 517 U.S. at 964 (O'Connor, J., principal opinion); *Miller v. Johnson*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. at 646-47. The systematic violation of these principles can provide persuasive circumstantial evidence that partisan maximization was the legislature's dominant and controlling rationale in drawing district lines. *Cf. Miller v. Johnson*, 515 U.S. at 913; *Grutter v. Bollinger*, 123 S. Ct. 2325, 2344 (2003) (approving the use of race when "all factors . . . are meaningfully considered").

To satisfy the intent element using circumstantial evidence, plaintiffs must show not only that these traditional districting criteria have been neglected but also that this neglect resulted from an effort to achieve partisan goals. *See Bush v. Vera*, 517 U.S. at 993 (O'Connor, J., concurring). In some instances, it may not be obvious at first glance whether the subordination of the traditional criteria was caused by excessive considerations of party or of race. *See, e.g., Easley v. Cromartie*, 532 U.S. at 241-58. If the map's bizarre shapes and splintered municipalities are largely confined to the boundaries of heavily black or Latino districts, race rather than party likely predominated. *See, e.g., Bush v. Vera*, 517 U.S. at 965-76 (O'Connor, J., principal opinion). But if these defects are also found along the boundaries separating majority-white districts – and especially where Republican districts abut Democratic ones – *partisan* gerrymandering is more likely the culprit.

B. The Effects Element

Because partisan-gerrymandering claims – unlike racial-gerrymandering claims under the *Shaw* doctrine – ultimately hinge on the systematic debasement of certain citizens' voting strength, plaintiffs also must satisfy the demanding test for unconstitutionally discriminatory partisan *effects* on a

statewide basis. By themselves, bad intent and bizarre district shapes can never make out a valid claim of partisan gerrymandering. *See Bandemer*, 478 U.S. at 139, 141 (plurality opinion).

1. The Majoritarian Standard

To satisfy the effects element, plaintiffs must show that the plan needlessly undermines the democratic accountability of elected representatives to shifting majoritarian preferences – specifically, that the rival party's candidates could be consigned to less than half the seats even if its candidates consistently won a majority of votes statewide. Such a plan effectively transforms majoritarian government into its opposite. *See id.* at 126 n.9 (majority opinion).

Importantly, this test does not compel proportional representation and is not satisfied by a mere demonstration that a political party has won fewer seats than its share of the electorate suggests. District-based systems with winner-take-all elections rarely generate proportionality, and it is normal for the party winning a relatively large majority of the votes statewide to carry an even larger majority of the seats. *See id.* at 130, 133 (plurality opinion). Moreover, the Constitution gives no group a right to proportional representation. Indeed, the Constitution's "majoritarian ethic" would be upheld regardless of whether the prevailing party in an election won a proportionate share of the seats or 100% of the seats – as might well occur, for example, if Pennsylvania elected all of its Representatives at-large, in one statewide contest, as it did in the early days of the Republic. *See* Kenneth C. Martis, *The Historical Atlas of United States Congressional Districts, 1789-1983*, at 50, 52 (1982). *But see* 2 U.S.C. § 2c (generally requiring single-member House districts).

But democracy is thwarted when one party can consistently earn majority support in the electorate yet never

win as many seats as the party it outpolls. As Justice Stewart put it, redistricting plans should not "permit the systematic frustration of the will of a majority of the electorate of the State." *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 753-54 (1964) (dissenting opinion); *see Bandemer*, 478 U.S. at 126 n.9; *id.* at 133, 135 (plurality opinion). Thus, a plan does not become unconstitutional merely because in one or two election cycles particular candidates win upsets and give one party an unexpectedly large number of congressional seats. Likewise, the Constitution would not bar a plan that is drawn to favor a particular incumbent, but is otherwise fair statewide.

At bottom, the majoritarian standard simply reflects the fundamental democratic principle of majority rule – a party that earns majority support (even by a very slim margin) should have at least a fighting chance (not a guarantee) of winning a majority of seats. If gerrymandering enables one party to lock up a majority of seats even if the other party overtakes it in popular support, democratic accountability ceases to function as a check on governmental power. Our Constitution does not empower partisan cartographers to invert popular minorities into governing majorities.[30] As Judge McConnell has explained, a districting scheme that

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[30] Defendants cannot defeat a claim merely by showing that the rival party would get a majority of seats if it increased its vote share to a level that history shows to be improbable. It will always be true that either party would win a majority of seats with *some* percentage of the vote. Under "the basic majoritarian principle," it should be enough for plaintiffs to show that their party will be consistently consigned to minority status with 50% or more of the vote. Arend Lijphart, *Comparative Perspectives on Fair Representation*, in *Representation and Redistricting Issues* 143, 147 (Bernard Grofman, Arend Lijphart, Robert B. McKay & Howard A. Scarrow eds., 1982); *see also* Bernard Grofman & Howard A. Scarrow, *The Riddle of Apportionment: Equality of What?*, 70 Nat'l Civic Rev. 242, 253 (1981).

places "a minority faction . . . in complete control, without regard to democratic sentiment, violates the basic norms of republican government."[31]

Appellants urge the Court to adopt this majoritarian standard because it distinguishes the permissible consideration of politics from egregious and unconstitutional partisanship in redistricting. But regardless of how the Court ultimately defines the proper standard, it must reject the lower courts' misguided requirement that plaintiffs prove they "will be completely shut out of the political process" as a result of separate burdens on rights of free speech and association. J.S. App. 33a; *see id.* at 39a (citing *Badham v. Eu*, 694 F. Supp. at 670). The "shut out" test eviscerates *Bandemer* and conflicts with both the Framers' understanding of Article I and this Court's long-standing interpretation of the Equal Protection Clause in voting cases.

2. Operationalizing the Majoritarian Standard

Evaluating the effects element in a partisan-gerrymandering case will generally require a two-step inquiry. *First*, as a necessary prerequisite, plaintiffs must show that the challenged districting plan systematically "packs" and "cracks" their party's voters. *Second*, plaintiffs ultimately must show, based on the "totality of circumstances" – which would encompass, among other things, the targeting of one party's incumbents – that the plan could consistently prevent plaintiffs' party from winning a majority of seats even if its candidates repeatedly earned a narrow majority of votes statewide. This two-step structure resembles the inquiry courts use to evaluate claims under the "results" test of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which requires plaintiffs first to prove the "*Gingles* preconditions" and then to demonstrate vote

[31] McConnell, *supra* note 23, at 105.

dilution under the "totality of circumstances" standard. *See Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994) (citing *Gingles*, 478 U.S. at 46-51, 55-58, 79-80).

Proving Systematic "Packing" and "Cracking" of One Party's Voters. As discussed above, the primary techniques used by political mapmakers seeking to dilute the votes of a rival group are "packing" and "cracking." By "packing" most of the rival party's voters into a few districts where they have excessive majorities, and "cracking" the rest into a larger number of districts where they have no real prospect of electoral success, partisan mapmakers can partially disenfranchise one party's voters. *See Gingles*, 478 U.S. at 46 n.11; *see also* 28 C.F.R. § 51.59(c)-(d). Because these techniques are central to any severe partisan gerrymander, plaintiffs should be required to prove first that they were used systematically to debase their votes.

To see how packing and cracking work in practice, a numerical example is useful. Imagine a highly competitive State with 700 voters (350 leaning Republican and 350 leaning Democratic) and seven congressional districts, each containing 100 voters. In Election #1, a fair map is in place, with two districts where Republicans have a 52-to-48 edge, two districts where Democrats have a 52-to-48 edge, and three other districts that appear to be 50-50 tossups, where the winner will be determined by the quality of campaigns, turnout, and perhaps a bit of luck. Each party has the same number of supporters statewide, and neither party can be assured of controlling a majority of seats in the State's congressional delegation.

But if, instead, redistricting occurs and the Democrats enact a partisan gerrymander, then Election #2 might go as follows: The Republicans will now have a 75-to-25 advantage in each of two districts, and the Democrats will have a 60-to-40 advantage in each of the other five districts. Although both parties still have the same number of

supporters statewide (350 apiece), Democrats will now control a supermajority of the seats (five out of seven). Two years later, in Election #3, even if the Republicans retain all of their original supporters and convince five Democrats in each district to switch sides and vote Republican – giving them a resounding 55%-to-45% advantage statewide – the Republicans still will win only two of the seven seats. (Republicans will then have 80-to-20 majorities in two districts but will lose each of the other five districts by a vote of 55 to 45.) In the first two districts, Republicans are "packed" because 75% or 80% is an excessive majority; and in the other five districts, Republicans are "cracked" because 40% or 45% is an ineffective minority. While most of the Republican votes are wasted, most of the Democratic votes are efficiently distributed across the districts. The result is that five districts are now significantly more Democratic than the State's average district, but only two are more Republican. By contrast, prior to the gerrymandering, roughly half the districts were more Democratic than average, and half were more Republican than average.

In assessing a newly enacted map, one can identify systematic packing and cracking by considering whether, in a 50-50 election, one party would consistently carry more than half the districts. One way to answer that question, even before elections have been held using the new districts, is through statistical analyses based on prior statewide races. *See infra* pp. 45-48 (describing expert testimony in the record below).[32] If the facts show a high degree of

[32] Redistricting experts typically study how many districts each party would carry in a 50-50 election by analyzing data from previous elections for statewide offices such as U.S. Senator, governor, and attorney general. *See, e.g.*, JA 32-34; Charles Backstrom, Leonard Robins & Scott Eller, *Establishing a Statewide Electoral Effects Baseline* in *Political Gerrymandering and the Courts* 145, 159-65 (Bernard Grofman ed., 1990). Elections held under the challenged map may be a poor *continued*

confidence that, in any 50-50 election, one party will carry more districts than the rival party, then the rival party's voters have been systematically packed and cracked and the plan may frustrate majority rule if that party garners a slim majority of the vote statewide.

As this discussion suggests, the only way to assess packing and cracking is on a statewide basis. *See Bandemer*, 478 U.S. at 127, 136 (plurality opinion); *see also Georgia v. Ashcroft*, 123 S. Ct. 2498, 2511 (2003) (requiring statewide assessment of claims brought under Section 5 of the Voting Rights Act because "gains in the plan as a whole" may offset losses in particular districts). *Compare Easley v. Cromartie*, 532 U.S. at 243 (unlike partisan gerrymandering, racial gerrymandering can be confined to one district). The fact that a given district may favor a given party has no significance by itself, absent statewide effects.

In some cases, defendants may argue that packing and cracking the rival party's voters were unavoidable consequences of their "natural" geographic distribution across the State. For example, one might expect that packing Democrats in New York State follows inevitably from the huge mass of overwhelmingly Democratic neighborhoods in New York City, assuming there are no equivalently large and lopsided concentrations of Republicans elsewhere in the State. To overcome that defense, plaintiffs should be required at trial to present an alternative "illustrative" plan that eliminates or substantially reduces the partisan bias in the challenged plan while respecting the State's traditional

measure because the map itself can skew each party's vote totals. In 2002, for example, Democratic congressional candidates in Pennsylvania received a much lower share of the statewide vote because there were more Republican than Democratic incumbents left standing after redistricting and because five of the Republicans were unopposed by Democrats in their new noncompetitive districts.

districting principles (contiguity, compactness, and so forth). This requirement – that plaintiffs produce an illustrative plan showing that there is indeed a remedy for the wrong they allege – comes directly from this Court's Voting Rights Act jurisprudence. *See Gingles*, 478 U.S. at 50-51 (requiring plaintiffs to present an alternative map demonstrating that their minority group is sufficiently large, geographically compact, and politically cohesive to constitute an effective voting majority in at least one additional district).

Proving Frustration of Majority Rule Under the "Totality of Circumstances." Proof of systematic packing and cracking would be necessary – but not always sufficient – to make out a claim of unconstitutional partisan gerrymandering. A court must assess the probative significance of packing and cracking after considering all circumstances with arguable bearing on the issue of partisan gerrymandering. *Cf. De Grandy*, 512 U.S. at 1013. As in Voting Rights Act cases, this inquiry will require lower-court judges to use their "familiarity with the indigenous political reality" to conduct an "intensely local appraisal" of the totality of circumstances. *Gingles*, 478 U.S. at 45, 78-79 (citations and internal quotation marks omitted).

Courts could consider many factors at this stage of the inquiry, including how the plan affects specific candidates and especially the role of incumbency. At the congressional level, political scientists generally estimate that incumbents have an advantage of somewhere between five and twelve percentage points. *See* Gary C. Jacobson, *The Politics of Congressional Elections* 21-40 (5th ed. 2001). Thus, if a new map targets for defeat only one party's incumbents, that disparate effect must be taken into account. In theory, pairing of incumbents could be used to *offset* packing and cracking, resulting in a reasonably fair plan. More often, it will be used to further benefit the controlling party.

Whatever the factors considered in the totality-of-circumstances inquiry, the trial court ultimately must answer a single question: Could the redistricting plan operate to thwart the will of the majority?

III. THIS IS A TEXTBOOK CASE OF UNCONSTITUTIONAL PARTISAN GERRYMANDERING.

Pennsylvania's 2002 congressional plan is the paradigmatic example of an extreme partisan gerrymander. As Pennsylvania Chief Justice Zappala put it, "If the record of this case does not establish unconstitutional political gerrymandering, *no such claim exists*." J.S. App. 125a (emphasis added). The Court should make clear that such a claim does exist and should direct the District Court to consider it under the proper standards. Under the test Appellants propose – or any variant of that test faithful to the Framers' vision of majority rule – Appellants have alleged more than enough to survive a motion to dismiss. The trial court erred by requiring them to prove that they had been "'shut out of the political process.'" J.S. App. 11a-12a (citation omitted). This Court should reverse that judgment and give Appellants a chance to prevail on remand.

A. Appellants Alleged Extreme Partisan Gerrymandering that Violates the Constitution.

Appellants' complaint directly addressed both discriminatory intent and discriminatory effects. Pointing to direct evidence of intent, the complaint stated that the map was drawn at the urging of Republican leaders in Washington seeking "maximum partisan advantage, regardless of the cost," and quoted the chair of the National Republican Congressional Committee as saying that Pennsylvania would serve as payback for Democratic gerrymandering in Georgia: "'Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate. . . . [Pennsylvania] will make Georgia look like a picnic.'" J.S. App. 133a-134a (quoting Rep. Thomas M.

Davis III).[33] Back in Harrisburg, Appellants alleged, Democratic state legislators were shut out of the legislative process, and their leaders were not even shown the new map until the day before the bill's final passage. *Id.* at 134a-135a.

The complaint then alleged that the new map neglects the traditional districting principles that this Court has identified in its *Shaw* line of cases. Specifically, the complaint alleged that "District 7 is barely contiguous" and that the new districts are "far less compact" than those in the previous plan, which the Pennsylvania Supreme Court established in 1992. *Id.* at 131a-132a, 136a. The complaint specifically highlighted the bizarre shapes of new Districts 6, 8, 12, and 13: "District 6, for example, looms like a dragon descending on Philadelphia from the west, splitting up towns and communities throughout Montgomery and Berks Counties. . . . District 8 includes an ungainly gash that at one point narrows to 300 yards and extends five and a half miles into Montgomery County, nearly splitting neighboring District 13 into two. District 12 snakes through several counties, leaving no fewer than 25 split cities, towns, and boroughs" in its wake. *Id.* at 136a; *see also id.* at 164a-166a (color maps); JA 260 (color map).

Appellants also alleged that respect for political subdivisions took a backseat to partisan maximization, as county splits proliferated and the number of local government units (cities, boroughs, and townships) that were

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[33] *See* Thomas B. Edsall, *Democrats Hold Edge Over GOP in Redistricting; Gains Still Possible for Republicans*, Wash. Post, Dec. 14, 2001, at A55; *see also* Tim Curran & John Mercurio, *A Seat at the Table: Parties Brace for Looming Remaps*, Roll Call, Mar. 19, 1998 ("'[The Democrats] losing three seats sounds like a pretty good plan. . . . I am not going to lie to you. We want to maximize Republican seats.'" (quoting Appellee John Perzel of the Pennsylvania House of Representatives)).

sliced by congressional-district lines increased more than seven-fold from the 1992 map. *See* J.S. App. 132a, 135a. As the complaint stated, "[r]ather than protecting communities of interest, [the new map] fractures them, substituting meandering and irregular lines throughout the state." *Id.* at 135a-136a.

With reapportionment costing Pennsylvania two congressional seats, some pairing of incumbent Representatives was unavoidable. *See id.* at 133a; *see also id.* at 55a. But "rather than preserving the seniority and power of the Pennsylvania congressional delegation [and] thereby enhancing Pennsylvania's clout in Washington," the General Assembly needlessly paired additional incumbents and effectively created Republican-leaning open seats "to replace Democratic members who have seniority with first-term Republicans." *Id.* at 136a.

Appellants' complaint further alleged a causal nexus between these neglected traditional districting principles and the legislature's Republican maximization agenda. *Id.* at 135a. Thus, the complaint alleged more than sufficient discriminatory intent to satisfy even the elevated intent standard that Appellants propose here.

As for discriminatory effects, the complaint alleged that the new map was an "invidious partisan gerrymander[]" that would "consistently degrade[] the votes of Democrat[s]" and "frustrate the will of the majority." *Id.* at 131a, 137a, 140a. The complaint alleged that Pennsylvania is a politically competitive "swing" State where Democrats could be expected to vie for a majority of votes and – barring any significant partisan bias in redistricting – for a majority of congressional seats. In the five most recent statewide races combined, Democrats had averaged 50.1% of the major-party vote, and in the most recent congressional elections (in November 2000) they had garnered 50.6% of the major-party votes cast across the State. *Id.* at 137a-138a.

The complaint then alleged that the new map would prevent a Democratic majority of voters from electing a Democratic majority in the congressional delegation. Partisan manipulation of district lines had "packed" and "cracked" Democrats, giving Republicans an artificial advantage in 13 or perhaps even 14 of the State's 19 districts. *Id.* at 138a-140a. The complaint explained that the map would allow the Republican Party to capture at least twice as many seats as the Democrats, even if the Democratic candidates earned greater popular support statewide. *Id.* In making these allegations, the complaint cited multiple statewide elections, as well as congressional-election returns, and explained that the 13-to-6 pro-Republican "bias will not apply in simply one political election, but will affect every future election under [the new plan], regardless of the political conditions. It cements Republican power and effectively reduces Democrats to being a small minority of the Commonwealth's delegation for the coming election and likely the coming decade." *Id.* at 137a-138a, 140a.

Beyond the quantitative evidence of disparate packing and cracking, Appellants' complaint alleged other practical political effects of the new districting map: "The fact that 13 or 14 districts are now designated as 'Republican districts'" would "dramatically affect[] the Democratic Party's . . . organizing, recruitment of viable candidates, fund-raising, and voter turnout efforts." *Id.* at 141a. In short, the complaint alleged, the new redistricting plan "sends a clear message to the people of Pennsylvania – electing Republicans is more important than the will of the majority." *Id.* at 142a.

B. The Evidence Adduced at Trial Confirmed the Validity of Appellants' Allegations.

Although this Court need only decide whether the facts Appellants alleged in their complaint were sufficient to

survive a motion to dismiss, these allegations were supported by evidence presented to the District Court during the one-person, one-vote trial, where a key issue was what policies had motivated Appellees. Based on that evidence, the District Court specifically found, as a matter of "undisputed fact[]," that Act 34 (like Act 1) "jettisons every . . . neutral non-discriminatory redistricting criteri[on] that the Supreme Court has endorsed." J.S. App. 9a n.3, 12a (citations omitted); *see also id.* at 55a (concluding that "neutral criteria were not high on the [General Assembly's] priority list").

The District Court's findings, *see, e.g., id.* at 54a-55a, were based in part on the testimony of Appellants' expert, Professor Allan J. Lichtman. JA 28-117. Using two standard mathematical measures of district shape, Professor Lichtman confirmed that the new plan was substantially less compact than its predecessor (which the Pennsylvania Supreme Court had ordered into effect in 1992). *Id.* at 57-59, 91-92, 266-67. Furthermore, maps and exhibits introduced into evidence at trial showed that the new boundary lines separating Republican districts typically were smooth and fell neatly along county or municipal borders, while boundary lines defining Democratic districts tended to be ragged and disrespectful of political subdivisions, as they sliced surgically into specific cities to extract Democratic-leaning precincts from their Republican-leaning neighbors. *Id.* at 261, 266; J.S. App. 164a-166a (color maps). And roughly three-fourths of the municipalities split by the new map were divided between Democratic districts and Republican districts. *See* J.S. App. 154a-157a; JA 167-70, 261.

To assess the partisan composition of each of the 19 new districts, Professor Lichtman also analyzed (on a district-by-district basis) the results of all 18 statewide contests for single-member offices (*e.g.*, President, U.S. Senator, governor, treasurer, etc.) held in the previous decade. JA 32-

37, 44-45, 107. The major-party vote in the average district split almost exactly 50-50. *Id.* at 35. But 14 of the districts leaned Republican while only 5 leaned Democratic. *Id.* at 36-37, 261, 265. The three least competitive districts in the State (Districts 1, 2, and 14) were all overwhelmingly packed with Democrats (averaging 77%, 82%, and 66% Democratic, respectively). *Id.* at 261.

The record evidence also shows the distribution of Democratic and Republican votes in *each* of the 18 statewide contests, taken separately. *Id.* at 273-76. In the six closest contests, all of which were narrow Republican victories in which the Democratic candidate lost by less than three percentage points, the Republican candidate would have carried 13 or 14 of the new districts each time, while the Democratic candidate would have carried only 5 or 6 districts. *See id.* at 274, 276.

Tellingly, a consistent pattern can be found in *every one of the 18 statewide contests* over the previous decade, including close contests and landslides alike. *See id.* at 273-76. In every one of these 18 contests, a sizable majority of the newly created districts were more Republican than the average district, while only a small minority of the new districts were more Democratic than average – indeed, heavily packed with Democratic voters. *See id.* When applied to the new districts, not one of these 18 contests revealed a pattern in which at least 10 of the 19 districts – or even 9 of the 19 – were more Democratic than the average district. *See id.*[34] This pattern strongly suggests that, wholly aside from any inequitable treatment of one party's

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[34] In two contests (the 1992 races for President and for treasurer), 11 districts were more Republican than average and 8 districts were more Democratic than average. *See* JA 274, 276. In five contests, the ratio was 12 to 7; in six contests, it was 13 to 6; and in five contests, it was 14 to 5. *See id.* at 273-76.

incumbents, the Pennsylvania plan is slanted to favor Republicans in a supermajority of districts. As explained earlier, this consistent pattern demonstrates the kind of systematic packing and cracking of one party's voters that can consistently thwart majority rule.

Professor Lichtman also showed that the new plan's disparate treatment of Pennsylvania's congressional incumbents would *exacerbate* the plan's underlying partisan bias. *Id.* at 48-51, 77. Two Democratic incumbents (Coyne and Doyle) were paired in the Pittsburgh area in District 14, and another two (Borski and Hoeffel) were paired in the Philadelphia area in District 13. *Id.* at 261. In southwestern Pennsylvania, two more Democrats (Mascara and Murtha) were effectively paired (and indeed ended up running against each other in the Democratic primary) in District 12, although Mascara lived one block beyond the district's perimeter. *Id.* at 51, 124-27, 170. And District 17, which leaned heavily Republican, was home to one incumbent from each party (Democrat Holden and Republican Gekas). *Id.* at 261, 265. All together, 7 of the 10 Democratic incumbents – but only 1 of the 11 Republican incumbents – were effectively paired.

This pattern was not offset by the creation of Democratic-leaning open seats. *Id.* at 51-52. Instead, the two open seats (Districts 6 and 18) were both designed to favor specific Republican state senators. *Id.* at 124-26, 133-34, 167-70; *see also id.* at 261. Indeed, as a color map revealed, *id.* at 260, District 18 consists of two noncontiguous land masses, hooked together by the entire former state senate district of Tim Murphy, who (not surprisingly) now represents District 18 in Congress.

In addition to incumbent pairings, Professor Lichtman's testimony highlighted the disparate "shifting" of incumbents' constituents. *Id.* at 53-57. The new map preserved most of the core of each Republican incumbent's district. *Id.* at 272.

By contrast, half a dozen Democratic incumbents were placed in districts where most constituents would be new to them. *Id.* On average, Democratic incumbents were placed with twice as many new constituents as were Republican incumbents. *See id.*

Finally, Professor Lichtman analyzed three alternative maps that Appellants introduced. *Id.* at 37-38, 52-55, 58-61, 262-68. When compared with the map Appellants were challenging, each alternative plan was more compact by any measure, broke fewer counties and municipalities, was substantially less biased (in terms of packing and cracking), and was far more evenhanded in its treatment of incumbents. *See id.* Thus, the partisan bias in the challenged plan flowed neither from respect for traditional districting principles nor from any unavoidable "natural" distribution of Democratic and Republican voters across the Commonwealth.

C. The 2002 Election Returns

The November 2002 election data, on which Appellees placed great reliance in their motions to affirm, were of course unavailable at the March 2002 trial and are not in the record below; but in any event, they confirmed the bulk of Appellants' allegations. As for the paired Democrats, Congressmen Borski and Coyne of Districts 13 and 14, respectively, chose to retire rather than face a fellow Democrat in a primary contest. Congressman Mascara soldiered on, but lost to Democratic Congressman Murtha in the District 12 primary. And in District 17, Congressman Holden carried 51% of the vote and scored an upset victory over Republican Congressman Gekas, who put in what two local political scientists politely termed "a less than able performance as a campaigner."[35] In the two open seats

[35] Stephen K. Medvic & Matthew M. Schousen, *The 2002 Pennsylvania Seventeenth Congressional District Race*, in *The Last Hurrah?* 291, 297 *continued*

(Districts 6 and 18), the anointed Republican state senators (Gerlach and Murphy, respectively) prevailed as expected. Overall, Republicans gained a 12-to-7 advantage in Pennsylvania's congressional delegation, as three Democratic incumbents were forced out of office.

All told, the Republican candidates won in 12 of the 13 districts predicted by Appellants. This was true even though the Democratic gubernatorial candidate at the top of the ballot won the only statewide race in 2002 by more than nine percentage points. In 10 of the 12 districts that Republicans won, the Republican congressional candidate took at least 60% of the total vote, underscoring how the new districting plan has entrenched an artificial Republican majority. As long as those 10 districts are locked into the Republican column, Democrats of course can never capture a majority of seats statewide. Yet Democrats could not have won any of these 10 districts even if they had done 10 points better (and Republicans had done 10 points worse) in every precinct in the State.

The evidence summarized here merely confirms what any astute observer of Pennsylvania politics would concede: Act 34 is an intentional and extremely effective partisan gerrymander that ignored every traditional redistricting principle in an effort to minimize one political party's opportunities and guarantee the upper hand to the other

(David B. Magleby & J. Quin Monson eds., 2003); *see id.* ("[T]he Gekas loss was the result of 'a candidate rusty from years of easy re-election wins and out of touch with changing constituencies; a bitter division between Gekas and the team brought in to help him; and a strategy that careened futilely from one tack to another.'" (quoting Brett Lieberman, *What Went Wrong?*, Harrisburg Patriot-News, Nov. 7, 2002, at A1)); *Almanac*, *supra* note 2, at 1406 (recounting that Gekas "was slow to learn modern campaign techniques"); *see also id.* (reporting that, after Holden's victory, national Republican leaders immediately designated him "a prime target for 2004").

party. If Act 34 is not a partisan gerrymander, then nothing is.

CONCLUSION

Democracy requires majority rule. Severe partisan gerrymanders, like the Pennsylvania plan at issue here, stand democracy on its head by promising to invert popular minorities into governing majorities. Accordingly, the Court should reverse the judgment below and remand the case to the three-judge District Court for further proceedings.

Respectfully submitted,

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